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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE STATE OF CALIFORNIA, THE STATE OF ARIZONA, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, and COACHELLA VALLEY WATER DISTRICT,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

(1) Whether the conceded waiver of sovereign immunity by the United States in intervening and asserting water rights claims for certain Indian reservations in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*) extends to an ancillary action in a District Court to determine the disputed boundaries underlying those same claims as mandated in *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*).

(2) Whether the Quiet Title Act applies to an action for judicial review of decisions by the Secretary of the Interior redefining and enlarging the boundaries of three Indian reservations where the action (a) seeks a determination of the boundaries solely to measure the implied water rights for the reservations and (b) does not seek to divest the United States of any part of its title to the disputed lands.

(3) Whether, if the Quiet Title Act is applicable, its exception for "trust or restricted Indian lands" bars judicial review where the United States has made no showing that the disputed areas are such lands other than to rely on the three disputed *ex parte* Secretarial orders at issue, two of which (Fort Mojave and Colorado River) were based on interpretations rejected by the Special Master in *Arizona I* and the third (Fort Yuma (Quechan)) overturned three prior departmental decisions to the contrary.

(4) Whether the boundary disputes present "cases or controversies".

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, The Metropolitan Water District of Southern California and Coachella Valley Water District, the latter two petitioners being public agencies of the State of California.

Respondents the United States of America, Donald P. Hodel, Secretary of the Interior, Quechan Indian Tribe, Fort Mojave Indian Tribe and Colorado River Indian Tribes.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Metropolitan Water District of Southern California v. United States* at 830 F.2d 139 (1987) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App. at 1a).

The memorandum decision of the United States District Court for the Southern District of California (Brewster, D.J.) is reported as *Metropolitan Water*

District of Southern California v. United States at 628 F.Supp. 1018 (1986) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App. at 12a).

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, petitioners The Metropolitan Water District of Southern California and Coachella Valley Water District brought this suit in the Southern District of California against respondents the United States and the Secretary of the Interior under the judicial review provisions of the Administrative Procedure Act (5 U.S.C. §702). The respondent tribes intervened as defendants and the States of California and Arizona were later joined as nominal defendants, although they aligned themselves with plaintiffs and are now petitioners here. The District Court denied respondents' motions for summary judgment, granted petitioners' cross-motion for summary judgment in part, declared the Secretary's 1974 order redetermining the boundary of the Fort Mojave Indian Reservation invalid, and set the boundary issue for trial.

Respondents obtained an order granting an interlocutory appeal on the merits of the District Court order. However, on that appeal respondents later raised the claim that the District Court lacked jurisdiction because (1) the United States had not waived its sovereign immunity and (2) petitioners Metropolitan and Coachella lacked standing to bring the action, defenses which had been intentionally waived in the District Court. The Ninth Circuit reversed on the ground that the District Court lacked jurisdiction because the suit was against the United States and

sovereign immunity had not been waived. The Ninth Circuit's judgment was entered on October 14, 1987. The petition for a writ of certiorari was filed on January 11, 1988, and was granted on April 25, 1988. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

STATUTES INVOLVED

(1) Administrative Procedure Act, 5 U.S.C. §702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. . . . Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. §2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. §666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

• • •

(3) McCarran Amendment, 43 U.S.C. §666

(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

• • •

(4) 43 U.S.C. §772

The Secretary of the Interior may, as of March 3, 1909, in his discretion, cause to be made, as he may

deem wise under the rectangular system on that date provided by law, such surveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

STATEMENT OF THE CASE

This case arises out of the historic water rights adjudication by this Court in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*") and its aftermath, *Arizona v. California*, 460 U.S. 605 (1983) (hereafter "*Arizona II*"). It involves the attempt by petitioners (hereafter "State Parties") to obtain a determination of two Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona I* (Fort Mojave and Colorado River) and one which was presented but not decided in *Arizona II* (Fort Yuma (Quechan)), so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. This Court in *Arizona II* invited the States of California and Arizona to intervene in an action brought by The Metropolitan Water District of Southern California (hereafter "Metropolitan") and Coachella Valley Water District (hereafter "Coachella") in the United States District Court for the Southern District of California to determine those three boundaries. The States were added as parties and have fully participated in the proceedings below. The amount of water at issue is about 104,000 acre-feet of diversions

in California, which is enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. §617 *et seq*).

In *Arizona I* California's share of the 7.5 million acre-feet of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. *Winters v. United States*, 207 U.S. 564 (1908). The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Arizona I* at 600-01. The reservations' priority dates are their dates of creation or the date of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

Special Master Simon H. Rifkind recommended an award to the five mainstream reservations of 905,498 acre-feet of diversions for 135,636 acres of "practicably irrigable acreage", even though the maximum

annual irrigated acreage on those reservations never exceeded 36,000 acres.[1] California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries. The boundary of the Fort Yuma Reservation was not challenged since the United States' claim at that time was consistent with long-standing Departmental interpretation of that boundary, an interpretation which was later overturned by the 1978 Secretarial order challenged below. The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who largely rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." *Id.* at 601.[2]

The Court's 1964 Decree (376 U.S. 340, 345) nevertheless awarded water rights to the two reservations based upon the Special Master's boundary determinations, "subject to appropriate adjustment by agree-

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[1] California Proposed Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104 and 18F:104, *Arizona v. California* (No. 8, Orig., Oct. Term 1958).

[2] Special Master Rifkind had recommended "practicably irrigable acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind (December 5, 1960) at 265. That objective has been frustrated by the three unresolved reservation boundary disputes which are the subject of this action.

ment or decree of this Court in the event that the boundaries of the respective reservations are finally determined." The quantities awarded are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, all parties concede that any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line. Metropolitan is heavily engaged in efforts to obtain a replacement supply for the water that will be diverted to Arizona and needs to know whether it faces an additional curtailment in the amount of some or all of the 104,000 acre-feet of diversions involved in the three boundary disputes. Likewise, any additional water rights for that portion of the Fort Yuma Reservation in Arizona will necessarily reduce the supply available to other users in Arizona holding junior rights within Arizona's fixed entitlement of 2.8 million acre-feet.

The three Secretarial Orders which are the subject of the litigation below were issued in 1969 (Colorado River), 1974 (Fort Mojave) and 1978 (Fort Yuma). There is no disagreement that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I*. It is also not disputed that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which California had successfully resisted in the trial before Special Master Rifkind. Nevertheless,

all three of the orders were entered without affording Metropolitan or any other affected water users notice or opportunity to be heard and purport to redetermine the boundaries *retroactive* to the date of their creation. The undisputed result is to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's *ex parte* boundary determinations was the United States' petition filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the added areas. The Special Master (Senior Fifth Circuit Judge Elbert P. Tuttle) appointed to hear those claims refused to consider the merits of the Secretary's *ex parte* orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. *Arizona II* at 634-35. Over the objections of the State Parties he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet of diversions annually.

Faced with the denial of their day in court, Metropolitan and Coachella sought review of the Secretarial boundary orders in the United States District Court for the Southern District of California under the judicial review provisions of the Administrative Procedure Act (hereafter "APA") (5 U.S.C. §702). Their amended complaint pleaded six claims for relief asking for judicial declarations (1) of the proper boundary in each of the three disputed areas and (2) that certain lands in the present or former bed of

the Colorado River located within the revised boundaries of the reservations were owned by Arizona and California and thus could not provide the basis for a *Winters* right. The State Parties' subsequent opposition to Special Master Tuttle's report in *Arizona II* made clear the limited purpose of the District Court action and that it in no way sought to "quiet title" to the lands involved in the water agencies or to otherwise divest the United States of title. For example, in oral argument Justice O'Connor posed the following question to counsel for Metropolitan:

> Question: The states don't claim any interest in the land itself. You are concerned only with the water rights attached to it which might change because of the boundary change. Is that right?
>
> Mr. Boronkay: That is correct. . . .

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 14-15 (hereafter "Oral Argument").

It was against that background that this Court, after describing the State Parties' efforts to obtain a resolution of the boundary disputes as being "only for the limited purpose of establishing additional Indian water rights, if any" (*Arizona II* at 634), rejected Special Master Tuttle's recommendations and directed the State Parties to pursue the District Court action:

> . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.

* * *

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.

Arizona II at 636, 638 (footnotes omitted).

Moreover, the Court's reference to the defenses raised by the United States in the District Court action, including sovereign immunity, was made after the Deputy Solicitor General had "disowned" those defenses in oral argument.[3] Following this Court's decision in *Arizona II* the United States amended its motion to dismiss the District Court action to with-

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[3] The exchange between Justice White and Deputy Solicitor General Claiborne on this point is set out in the appendix to this brief.

draw all of the defenses except its challenge to the three claims which asked for declarations as to the ownership of certain riverbed lands. It offered the following explanation:[4]

> Upon consideration of the issues involved, the defendants believe it appropriate to withdraw most of the objections raised in their earlier motion to dismiss. *Where the action merely questions the accuracy of the determination of reservation boundaries, and the legal title to the lands is not at issue, we think the action may go forward pursuant to the Administrative Procedure Act.* We continue to object, however, to the portion of the suit that claims that title to certain riverbed lands should be vested in the State of Arizona or the State of California. It appears to us that that portion of the suit is barred, among other things, by the terms of the Quiet Title Act. . . .

The District Court subsequently dismissed the riverbed claims. The parties then agreed to address the boundary disputes individually, starting with Fort Mojave. Cross motions for summary judgment were filed, followed by extensive briefing and three days of oral argument during which the United States conceded that Metropolitan is "a party aggrieved by the Secretary's action and that they have standing under the APA." Transcript of District Court proceedings of December 10, 1984 at 104.

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[4] U.S. Memorandum in Support of Motion to File Amended Motion to Dismiss at 3 (June 17, 1983) (emphasis added).

The District Court voided the Secretary's Fort Mojave order on the basis that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. §772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due-process protection, which it had been denied. The District Court also held that a *de novo* trial as to the proper boundary was appropriate under *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), because (1) the Secretary's 1974 order constituted a partial "adjudication" of Metropolitan's water rights and (2) the Secretary's fact-finding procedures were grossly inadequate because Metropolitan had not been given any notice of the Secretary's *ex parte* procedure nor any opportunity to be heard.

The United States and the Tribes moved the District Court for an order certifying its decision for an interlocutory appeal under 28 U.S.C. §1292(b). In their pleadings the Tribes asserted that: "Following the Supreme Court's 1983 decision in *Arizona v. California*, the conclusion that MWD's interests merit judicial review of the Secretary's decisions is not subject to question. . . . [and] the parties intend this litigation to constitute the necessary review."[5] The District Court granted those motions.

After the Court of Appeals had granted an interlocutory appeal, respondents decided that they did not

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[5] Memorandum of the Fort Mojave Indian Tribe, The Quechan Tribe and the Colorado Indian Tribes in Support of Their Motion to Certify Issues for Interlocutory Appeal at 20-21, notes 7 and 8 (March 25, 1986).

want the District Court to decide the merits of the boundary issues and resurrected the sovereign immunity and standing defenses which they had earlier abandoned. The Court of Appeals was persuaded that the Quiet Title Act (hereafter "QTA") precluded the State Parties' action and ordered the District Court to dismiss the case for lack of jurisdiction (Pet. App. at 1a). It also suggested that the action "presents the additional jurisdictional problem of the absence of a case or controversy", but did not decide that issue (Pet. App. at 6a). It did not address the merits of the District Court's decision. The court also did not address (1) the Tribes' contention that the suit was barred by the QTA's 12 year statute of limitations because the State Parties knew of the United States' boundary claims as early as the original litigation of those disputes in the 1950's in *Arizona I* and (2) the United States' suggestion that, even if the APA applies to the State Parties' claims, two of those claims may be barred by the 6 year statute of limitations in 28 U.S.C. §2401.[6]

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[6] Opening Brief for Tribal Appellants (February 1987) at 23-24; U.S. Reply Brief (May 1987) at 5, n. 2. The respondents' arguments would require the State Parties, who prevailed in *Arizona I* with regard to the Fort Mojave and Colorado River Reservation boundary issues, to have immediately commenced an action to relitigate the same issues, a procedure totally at odds with this Court's conclusion in *Arizona II* that the United States had that burden. *Arizona II* at 637.

The 1981 District Court action was timely as to the 1978 Fort Yuma order under either the United States' or the Tribes' theory. With respect to the 1969 Colorado River and 1974 Fort Mojave orders, the State Parties contend that no cause of action accrued with respect to either until 1978 when the United States filed its petition to reopen the decree in *Arizona I* for the allocation of additional *Winters* rights based on those orders. But even if those causes of action accrued in 1969 and 1974, either limitation period should be tolled while the boundary issues were in contention before this Court in the sequential stages of *Arizona v. California* resulting in the decision in *Arizona II*. See *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965).

The Ninth Circuit's decision rests on several basic premises: (1) the waiver of sovereign immunity by the United States in asserting water rights claims for the three reservations in *Arizona v. California* does not extend to the litigation of the boundary components of those same claims in the ancillary proceeding before the District Court; (2) the waiver of sovereign immunity in the Administrative Procedure Act (5 U.S.C. §702) is not applicable because the Quiet Title Act (28 U.S.C. §2409a) is a "statute that grants consent to suit [and] expressly or impliedly forbids the relief which is sought" because it bars actions to quiet title to "trust or restricted Indian lands" and "the effect of a successful challenge [by petitioners] would be to quiet title in others than the Tribe" (Pet. App. at 9a); and (3) the action is not basically a water rights suit and, in any event, the QTA's preservation of the McCarran Amendment's waiver of sovereign immunity for water rights adjudications involving the United States is not applicable because the State Parties do not seek a "general stream adjudication".

SUMMARY OF ARGUMENT

The waiver of sovereign immunity which resulted from the United States' intervention in *Arizona I* to assert reserved water rights under the *Winters* doctrine for all practicably irrigable acreage within the boundaries of the Fort Mojave, Colorado River and

Fort Yuma Indian reservations extends to the present suit in the District Court to resolve the critical disputed boundary components of those claims. That waiver is not limited to the original *forum* in which the federal claims were presented, *i.e.*, this Court, but relates to the *issues* reasonably encompassed within the subject matter of the claims. Since the claims were not resolved by this Court, the State Parties affected by the claims are entitled to seek judicial resolution of the disputes either in this Court or any other appropriate forum provided that the relief sought does not exceed that originally sought by the United States. There are no public policy reasons which support limiting the waiver to the original forum selected by the United States. To so limit the waiver would permit the continued inequitable forum shopping by the United States which has characterized its strategy in the 30 years since its boundary claims were unsuccessfully presented in *Arizona I*.

The extension of the sovereign immunity waiver to the District Court action is particularly appropriate since this Court's decision in *Arizona II* clearly treated the District Court action as ancillary to the proceedings in *Arizona v. California* over which this Court has retained continuing jurisdiction.

The Secretarial boundary determinations at issue are also subject to review under the Administrative Procedure Act's sovereign immunity waiver (5 U.S.C. §702). The Quiet Title Act (28 U.S.C. §2409a) is not a statute which expressly or impliedly precludes such review. The language, legislative history and judicial interpretation of that Act make it clear that it applies only to suits seeking to divest the United States of some or all of its interests in land. The State Parties

seek no such relief, but only a determination of the proper reservation boundaries for the limited purpose of determining the extent of the reservations' implied *Winters* water rights. The District Court action is a unique suit relating to water rights, which the QTA leaves unaffected and is not precluded by any other federal statute.

Even if the QTA were applicable, the United States must do more than merely allege that the disputed lands are "trust or restricted Indian lands" in order to invoke the QTA's exemption of such lands from its sovereign immunity waiver. At the very least, the United States must prove that there is a "substantial possibility" that the disputed lands are Indian lands, as the Eighth Circuit has required. The United States has made no such showing and, in light of the circumstances surrounding the disputed Secretarial decisions, cannot do so.

Although the Ninth Circuit only suggested, but did not decide that the boundary disputes do not present "cases or controversies", that conclusion is in error and should be corrected now. This Court's decision in *Arizona II* clearly assumed the existence of a justiciable controversy ripe for decision. The "probability" of "threatened injury" to Metropolitan is adequate to sustain jurisdiction even though the challenged boundary orders have not yet resulted in a reduction of Metropolitan's water supply, particularly since water is currently being diverted to the disputed lands on the Fort Mojave Reservation and the Colorado River Tribes have recently circulated for public comment a proposed land use development plan for the disputed lands on that reservation.

ARGUMENT

I. The United States has waived its sovereign immunity as to the reservation boundary disputes by asserting Indian water rights for the reservations in *Arizona I*.

There is no dispute that the United States' intervention in *Arizona I* and its assertion of *Winters* rights for the Fort Mojave and other Indian reservations waived its sovereign immunity to the extent necessary to adjudicate those claims.[7] The State Parties contend that such waiver extends to ancillary proceedings, such as the District Court litigation below, in which essential elements of those same federal claims are presented. The issue appears to be one of first impression. However, this Court long ago held, in a classic opinion by Justice Holmes, that "when the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter*." *Luckenbach S.S. Co. v. The Thekla*, 266 U.S. 328, 339-40 (1924) (emphasis added). The Fifth and Tenth Circuits have held that in such circumstances a later independent action or claim in intervention against the United States with respect to the same subject matter in the same district court are not barred by sovereign immunity. *United States v. Taunah*, 730 F.2d 1360 (10th Cir. 1984) (Indian land dispute); *United States v. Martin*, 267 F.2d 764, 769-70 (10th Cir. 1959) (water rights claims); *Jones v. Watts*, 142 F.2d 575 (5th Cir. 1944).

[7] *Arizona I* at 551. Justice White put the issue succinctly to counsel for the United States during oral argument in *Arizona II*:

> Question: But the United States is in this Court litigating . . . so it is subject to . . . having its case decided here. You can't get out of this case with a sovereign immunity claim.
>
> Mr. Claiborne: I appreciate that . . .

Oral Argument at 62.

Although the State Parties have found no case holding that the waiver of sovereign immunity which results from the United States' assertion of a claim in one forum extends to a separate suit in another forum on the same subject matter seeking resolution of an issue necessarily presented by the United States' claim, such a result may reasonably be implied from *The Thekla, supra*. Just as this Court made clear in rejecting Arizona's contention that its sovereign immunity barred intervention by the Tribes in *Arizona II*,[8] the United States' sovereign immunity is not compromised by requiring it to litigate in the District Court the identical claims it presented and litigated (unsuccessfully) before this Court in *Arizona I*, but which the Court left open for future resolution elsewhere. The State Parties seek no affirmative relief of any kind against the United States, *e.g.*, damages for permitting water diversions to the disputed area on the Fort Mojave Reservation in violation of the decree in *Arizona I*. Like a permissible counterclaim, the issue which the State Parties seek to have re-

[8] "The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised."

Arizona II at 614.

solved "arises out of the same transaction or occurrence as the main suit and the relief sought neither exceeds nor is different in kind from that demanded by the Sovereign". *United States v. Penn*, 632 F.Supp. 691, 693 (D.V.I. 1986). Consequently, as Justice Holmes concluded in *The Thekla*, "the reasons are strong for not obstructing the application of natural justice against the Government by technical formulations when justice can be done without endangering any public interest . . . [The Government] joined in the suit, and that carried with it the acceptance of whatever liability the *courts* may decide to be *reasonably incident to that act*." 266 U.S. at 341 (emphasis added).

The United States has not identified any public interest that would be endangered by extending the *Arizona v. California* waiver to the District Court action. Although Congress clearly may choose to limit a legislative waiver of sovereign immunity to particular courts (*United States v. Shaw*, 309 U.S. 495, 501 (1940)), there is no reason to so limit the judicially created *Thekla* rule in this case. Moreover, applying the *Arizona v. California* waiver to the general subject matter of the United States' *Winters* claims without limitation as to forum would be consistent with this Court's suggestion in *California v. Arizona*, 440 U.S. 59, 66-67 (1979), that the Congressional sovereign immunity waiver for quiet title actions in the QTA might have broadly extended to state courts had Congress not expressly restricted such jurisdiction to the federal courts.

The Ninth Circuit rejected the State Parties' argument on the ground that "an application to the Supreme Court under a continuing decree for a real-

location of water rights cannot be viewed, under any stretch of the imagination, as consent to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries". Pet. App. at 8a. That analysis is plainly in error and evidences a lack of understanding of the critical relevance of a Secretarial boundary determination to the magnitude of a *Winters* water right. The United States told this Court in *Arizona I* that "the determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation" and, as this Court later noted, "all of the parties treated the boundary matters as fully adjudicable issues of material fact or law." *Arizona II* at 637.

The United States, having had (1) its underlying boundary claims for the Fort Mojave and Colorado River reservations rejected in *Arizona I*, (2) its subsequent attempt to preclude judicial review of its *ex parte* validation of those same claims, along with its 1978 Fort Yuma decision, rebuffed in *Arizona II*, and (3) the boundary issues referred to the District Court for resolution, should not be permitted to run for cover after the District Court invalidated the Secretary's unlawful Fort Mojave boundary determination procedures. The United States' blatant forum-shopping strategy should be rejected.

The State Parties believe that the *Thekla* rule is particularly applicable to this controversy. This Court's directions to the District Court in *Arizona II* clearly linked those proceedings to the original proceedings in this Court, even if those directions may have fallen short of actually designating Judge Brewster a special master for the limited purpose of de-

termining the boundaries (a course of action that the State Parties believe remains open to the Court):

> Hence, in our judgment, the litigation filed in the United States District Court for the Southern District of California should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated. If there are issues in that action without substantial connection to the issues in this original action, they should be severed and adjudicated separately if their consideration would substantially delay the final resolution of the questions which have made it necessary to keep our decree in this action open to accommodate the results of unresolved issues.

Arizona II at 639 (emphasis added).

That directive followed rejection of the arguments of the States of Arizona and California that this Court should decide the boundary issues. Acknowledging that "the States have not yet sought to intervene in that litigation" (*id.* at 638), the Court directed that "intervention motions . . . should be promptly made "and "[i]f the States and/or the agencies wish to challenge the recently finalized administrative action regarding the 'Checkerboard area' . . . , they should amend their complaint and raise the issue in the District Court suit." *Id.* at 639. Although the Court's directions were not instructions on remand, since the District Court action was not directly before it, they were far more than advisory. The Court was clearly shifting the arena for the necessary resolution of the boundary disputes from a traditional Court-appointed

Special Master to the District Court. By that action the State Parties believe that the Court did not intend to nullify the waiver of sovereign immunity with respect to those same claims which resulted when the United States initially presented them in *Arizona I*.

We know of no reason why the Court may not utilize district courts to conduct proceedings ancillary to cases in its original jurisdiction, even though Congress has not expressly so provided. When it does, the district court's jurisdiction would be derivative from this Court, much like the rule on removal of cases from state to federal courts that existed prior to the Judicial Improvement Act of 1986 (28 U.S.C. §1441(e)). *Minnesota v. United States*, 305 U.S. 382, 389 (1939) (district court jurisdiction on removal derives from state court jurisdiction). That derivative jurisdiction would encompass the United States' waiver of sovereign immunity resulting from its intervention in this Court.

Although treating the District Court action as ancillary to the proceedings in *Arizona v. California* for sovereign immunity purposes would be without direct precedent, it is analogous to the concepts of ancillary and pendent jurisdiction. Those doctrines appear to be grounded on a common sense, equitable rationale permitting federal courts to decide all issues arising out of a single transaction or occurrence involving multiple claims even though a particular claim may lack a federal jurisdictional basis, at least where no clear constitutional or statutory prohibition precludes such jurisdiction. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976). Similarly, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800

(1976), this Court dealt with a difficult jurisdictional problem involving Indian reserved rights adjudications by invoking general "principles [which] rest on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' ". *Id.* at 817.

Finally, considering the frustrating delay that has already attended the State Parties' unsuccessful attempts to achieve a resolution of the boundary disputes over the past ten years, the State Parties urge the Court to short-circuit the United States' dilatory, forum-shopping strategy and designate District Judge Brewster as special master in *Arizona v. California* to complete his pending review of the Secretary's boundary determinations and submit his recommendations to the Court as expeditiously as possible. Otherwise, the State Parties forsee an endless series of appeals between the District Court, the Ninth Circuit, and this Court. The present sovereign immunity issue is just the first of several delaying tactics available to the United States. Lurking in the wings, even if the State Parties prevail on the APA versus QTA issue, are (1) the "case or controversy" issue which the United States raised before the Ninth Circuit but which that court did not decide (page 47 *infra*), (2) the statute of limitations issues raised by the Tribes and the United States (page 14 *supra*) but also not decided by the Ninth Circuit, as well as (3) the issues relating to the Secretary's resurvey authority under 43 U.S.C. §772 and the appropriate scope and standard of review of his boundary determinations, which were the issues presented on the interlocutory appeals below but not addressed by the Ninth Circuit.

II. The Administrative Procedure Act's waiver of sovereign immunity is applicable to the District Court action because neither the Quiet Title Act nor any other statute expressly or impliedly forbids the relief sought.

The Administrative Procedure Act (5 U.S.C. §702) was amended in 1976 to remove the barrier of sovereign immunity to suits for declaratory or injunctive relief against the United States, its agencies or officers. A qualification is that the amended section 702 does not authorize such relief if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Ninth Circuit's conclusion that the Quiet Title Act is such a statute is patently wrong.

The starting point for analysis of whether the QTA precludes the relief sought by the State Parties is the well established rule that APA review "is available absent some clear and convincing evidence of legislative intention to preclude review." *Japan Whaling Ass'n v. American Cetacean Soc'y*, ___ U.S. ___ , 106 S.Ct. 2860, 2866 (1986). The QTA waives sovereign immunity for actions "to adjudicate a disputed title to real property in which the United States claims an interest" but "does not apply to trust or restricted Indian lands. . . ." 28 U.S.C. §2409a(a).

The plain language of the QTA makes it clear that Congress intended it to apply only to suits seeking to divest the United States of some or all of its interests in land. Thus section 3(c) requires that a party bringing a suit under the Act must "set forth with particularity the nature of the right, title or interest which [it] claims in the real property". 28 U.S.C. §2409a(c). That the "quiet title" claim which must be

specifically alleged is one which would divest the United States of some or all of its title is further made evident by section 3(b), which provides that if the adverse private claim is sustained the United States may elect to retain the land and pay just compensation to the claimant. 28 U.S.C. §2409a(b). Inasmuch as it is undisputed that the State Parties have alleged no claim to the lands in the disputed area, the QTA is plainly not applicable. *See, e.g., Prater v. United States*, 618 F.2d 263 (5th Cir. 1980); *Kinscherff v. United States*, 586 F.2d 159 (10th Cir. 1978); *City of Sault Ste. Marie, Michigan v. Andrus*, 458 F.Supp. 465 (D.D.C. 1978). In *Landow v. Carmen*, 555 F.Supp. 195, 197 (D. Md. 1983), the court observed that "although there are many reported cases on the Quiet Title Act, this Court is not aware of any case holding that a dispute about a non-ownership interest is sufficient to confer Quiet Title Act jurisdiction." The State Parties' research confirms that analysis, and the United States seems to concede the point in its opposition to the State Parties' certiorari petition (U.S. Opp. Br. at 12):

> When Congress passed the QTA, it permitted challenges to the United States' claim of title to real property to be brought only by plaintiffs who themselves claim an interest in the same property.

Consequently, the District Court action cannot be viewed as one authorized under the QTA so as to preclude the APA waiver of sovereign immunity, as the United States told the District Court in amending its motion to dismiss (page 12 *supra*). On the contrary, it is a hybrid action necessitated solely because of this Court's decisions in *Arizona I* and *II* that (1)

"practicably irrigable acreage" is the measure of the Indian reservations' *Winters* rights and (2) the boundary disputes should be resolved in another forum. As such, it falls into the category described by the Justice Department's comments on the bill which added the sovereign immunity waiver to 5 U.S.C. §702 as follows:

> In the many areas where Congress has not acted, however, and *when its action is not addressed to the type of grievance which the plaintiff seeks to assert, suit would be allowed.*

S. Rep. No. 996, 94th Cong., 2d Sess. 27 (1976) (letter from Assistant Attorney General Scalia to Senator Kennedy) (emphasis added).

The statutory language is reinforced by its legislative history. S. 216 was introduced in 1971 to implement the 1970 recommendations of the Public Land Law Review Commission (PLLRC), on which three of the bill's sponsors had served.[9] Senator Jordan's opening statement at the Senate hearings on the bill made this clear:[10]

> Two of the bills before this hearing today, S. 216 and S. 579 are based upon recom-

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[9] Senators Jordan, Bible and Fannin were co-sponsors of S. 216. 117 Cong. Rec. 542 (1971). All served on the Public Land Law Review Commission. *One Third of the Nation's Land*, The Report of The Public Land Law Review Commission iv (1970) (hereafter "*PLLRC Report*").

[10] *Hearings on S. 216, S. 579 and S. 721 before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs.* 92d Cong., 1st Sess. 8 (1971) (hereafter "*Senate QTA Hearings*").

> mendations [growing] out of a 5-year study of the Public Land Law Review Commission on which I was privileged to serve. I hope that the Public Land Law Review Commission study and reports on the subject of omitted land and the related problems of suits to quiet title and the doctrine of adverse possession will help this panel expedite favorable action on these two measures.

Professor John Steadman, a consultant to the Administrative Conference of the United States on the subject of sovereign immunity, endorsed S. 216 and advised the Committee that it was consistent with Recommendation 113 of the PLLRC, which provided in pertinent part that "citizens should be permitted to bring quiet title actions in which the Government could be named as defendant." *Senate QTA hearings*, note 10 *supra*, at 65. The Commission defined "quiet title" in its statement explaining its recommendation as follows (*PLLRC Report*, note 9 *supra*, at 261 (emphasis added)):

> In any action brought against the Government to quiet title, *i.e., to establish who the owner is*, the Government has available to it the defense of sovereign immunity which it invariably asserts.

Similarly, throughout the hearings the witnesses focused solely on the need to afford private land claimants access to the courts in order to quiet title to areas in which *ownership* interests were in dispute between the United States and private claimants. *Senate QTA hearings*, note 10 *supra*, *passim*. A substitute bill proposed by the Justice Department did not

change the focus of the original proposal (*id.* at 30-31), as the Department's explanation of its proposal made clear:

> Perhaps the most common application of the proposed statute would be in boundary disputes between the United States and owners of adjacent property.

S. Rep. No. 575, 92d Cong., 1st Sess. 5 (1971).

Indeed, when the Senate Committee reported out what was essentially the Justice Department substitute, it stated that the bill was waiving sovereign immunity in quiet title actions because "[g]rave inequity often has resulted to private citizens who are thereby excluded, without benefit of a recourse to the courts, from *lands they have reason to believe are rightfully theirs*." *Id.* at 1 (emphasis added).

Adverting to the foregoing legislative history, this Court in *Block v. North Dakota*, 461 U.S. 273, 280 (1983), stated that the QTA was enacted against a background in which parties "*asserting title to land claimed by the United States* had only a limited means of obtaining a resolution of the title dispute" (emphasis added). It also recognized that the hearings on the proposed legislation reflected the "predominant view . . . that citizens asserting title to or the right to possession of lands claimed by the United States were 'without benefit of a recourse to the courts', because of the doctrine of sovereign immunity" and that "Congress sought to rectify *this state of affairs*" in the QTA. *Id.* at 282 (emphasis added).

Similarly, in its brief on the merits before this Court in *Block*, the United States characterized North Dakota's suit as one "to wrest title" from the Federal

Government (U.S. Br. at 11) and asserted that the QTA "established a uniform procedure for prosecuting claims to land to which the United States asserts title." *Id.* at 12. Significantly, the United States explained the relationship of 5 U.S.C. §702 to the QTA as follows:

> Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying title.

Id. at 23. The State Parties agree, and it is plain that the present boundary disputes fall into the former category, not the latter.

Consequently, it follows that the QTA's provision that it "does not apply to trust or restricted Indian lands" is similarly limited to claims that would divest the *United States* of some or all of its title to such lands, since it is the fee owner. *Minnesota v. United States*, 305 U.S. 382 (1939). As this Court recognized in *United States v. Mottaz*, 106 S.Ct. 2224, 2226 (1986) (emphasis added), the Indian lands exclusion "operates *solely* to retain the United States' immunity from suit by third parties challenging *the United States' title* to land held in trust for Indians." These were the kinds of claims made in *Mottaz*, *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), and *Florida Dep't of Business Regulations v. United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied* 475 U.S. 1011 (1986). In *Mottaz* the plaintiff sought a declaration confirming her alleged beneficial ownership of certain lands purchased by the United States and included in a national forest. Contrary to the respondent Tribes' contention that "[g]ranting plaintiff's relief would not have divested the United States of its title since it would be Indian trust lands instead of National Forest lands" (Tr. Opp. Br. at 14), the relief sought would have significantly curtailed the United States' fee title interest by imposing a trust status on those lands. Such a reduction in the United States' ownership interest is plainly covered by the QTA. The Justice Department's explanation of the scope of its proposed bill which was later enacted stated that "[t]he quieting of title where the plaintiff claims an estate less than fee simple—an easement or the title to minerals—is likewise included in the terms of the proposed statute." S. Rep. No. 575, 92d Cong., 1st Sess. 5 (1971).

In *Spaeth* the plaintiffs sought a declaration that the United States' claim that title to certain tracts of plaintiffs' farm might rest in certain Indian allottees was without merit. In *Florida*, although the State was not seeking to quiet title in itself, the Eleventh Circuit nevertheless found the QTA applicable because Florida sought an order invalidating the challenged transaction and "*divesting the United States of its title to land* held for the benefit of an Indian tribe". 768 F.2d at 1254 (emphasis added).

The State Parties argued below that the Indian lands exemption was not applicable because their claim would not divest the United States of any of its ownership interests. In response, the Ninth Circuit broke new ground and concluded that the QTA applies where "the effect of a successful challenge [by

petitioners] would be to quiet title in others than the Tribe". Pet. App. at 9a. The "others" can only be the United States, because there are no other claims to the disputed area pending in the District Court. That kind of result clearly is not barred by the QTA, since it simply affects the Secretary of the Interior's intramural management of the federal lands—it does not divest the United States of any aspect of its legal title to the disputed area. As was cogently recognized in a similar boundary dispute in *Pueblo of Taos v. Andrus*, 475 F.Supp. 359, 365 (D.D.C. 1979): "The relief requested in this case affects no ownership interest; it would merely adjust the boundaries between two parcels of government-owned land, one of which is held for the benefit of the Taos Pueblo."[11]

The Tenth Circuit has also correctly recognized that "adjudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987). Indeed, this Court recognized in *Arizona II* that such a boundary dispute might involve either "land titles or political jurisdiction". *Arizona II* at 629. The Ninth Circuit's failure to recognize the distinction, however, will frustrate resolution of important federal-state-Indian jurisdictional problems which flow from Secretarial orders

[11] The United States' opposition to the State Parties' certiorari petition asserts that *Pueblo of Taos* "is not at all instructive, because it was decided before this Court held in *Block* and *Mottaz* that the QTA is the exclusive means for challenging the United States' title." U.S. Opp. Br. at 13. The State Parties fail to see how the timing of the *Pueblo of Taos* decision affects the merits of that court's analysis of the effect of the boundary determination at issue.

affecting Indian reservation boundaries. Whether states have civil jurisdiction over various activities on Indian reservations may often turn on the proper location of a reservation's boundary, just as federal-state criminal jurisdiction turns on whether an area where a crime is committed is "Indian country" under 18 U.S.C. §1151. *See generally*, Cohen, *Handbook of Federal Indian Law*, ch. 6, sec. C (1982); *Ute Indian Tribe v. Utah*, 773 F.2d 1087, (10th Cir. 1985), *cert. denied* ___ U.S.___ , 107 S.Ct. 596 (1986). The boundary issues raised in the numerous "reservation disestablishment" cases, although not affecting land titles, are customarily presented and decided in habeas corpus proceedings, which no one has ever suggested are barred by the QTA. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984). However, under the Ninth Circuit's assumption that "all boundary disputes with the government" are governed by the QTA without regard to whether resolution of the boundary dispute would divest the United States of title (*Fadem v. United States*, 791 F.2d 1381, 1383 (9th Cir. 1986)) states would have no recourse to the courts under either the QTA or the APA to resolve critical jurisdictional disputes turning on Secretarial Indian boundary determinations. Congress obviously intended no such result in either act.

Beyond that error, the Court of Appeals further misconstrues the nature of the action below in asserting that "to allow this suit would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to the lands it holds in trust for them." Pet. App. at 10a. This is not so. Similarly, the Tribes' assertion that the District Court action "seeks an order which

will effectively divest the Tribes of any interest in the questioned lands and compel the Secretary to administer such lands as public lands rather than Indian lands" (Tr. Opp. Br. at 8) is also erroneous and misleading. The "trust status" of the federal lands involved is a voluntary servitude self imposed by the United States on its fee interests by the executive orders which created the three reservations. If the Secretary's boundary determinations are found to be erroneous, the United States clearly still retains the power to impose a trust status on the disputed lands. The State Parties would not and probably could not challenge a policy decision of the Secretary to add the disputed public lands to the reservations as Indian trust lands (assuming that he possesses statutory authority to do so) or the obvious power of Congress to declare them trust lands. All that they challenge is the Secretary's attempt to give the added lands a *retroactive* earlier *water* priority by a Procrustean "reinterpretation" of the controlling executive orders rather than having Congress simply add the lands to the reservations, in which event they would have a water priority junior to Metropolitan's. *Arizona II* at 641 (Cocopah Reservation).

Finally, the Ninth Circuit erroneously asserts that the State Parties challenge "the fundamental authority of the Secretary to establish reservation boundaries and to protect the property interests of Indian tribes. This [they] cannot do." Pet. App. at 10a. The State Parties make no such challenge. First, the Secretary presently has no authority to "establish reservation boundaries." Only Congress can do that. What the Secretary does possess is the authority and duty to interpret fairly and accurately statutes and exec-

utive orders creating Indian reservations in order to segregate them from the public lands by survey. That conceded authority is not challenged, only the way that it was unlawfully exercised in the case of the Fort Mojave Reservation for the reasons explicated by the District Court. Again, the court in *Pueblo of Taos* applied the proper analysis: "The gravamen of this action, however, is not a challenge to the authority of the Attorney General to issue the opinion he did, but rather is a request seeking this Court's judicial interpretation of the same matter presented to the Attorney General". 475 F.Supp. at 363-64 (footnote omitted).

Second, the State Parties do not challenge the basic authority of the Secretary "to protect the property interests of Indian tribes", but only his improper exercise of that authority in a manner that would unlawfully impair non-Indian rights under existing water delivery contracts. Once the reservation lands are properly segregated from the public lands the Secretary may freely carry out his trust responsibilities with respect to the Tribe's property interests in the reservation trust lands. In any event, the objective of the District Court action is by no stretch of the imagination to divest the United States of any of its ownership interests in the disputed area, whether public lands or lands held in trust for Indians, and it is only for such a title-divesting claim that Congress intended the QTA to be the exclusive remedy.

In summary, given the nature and background of the State Parties' boundary claims and considering that *Block* followed closely on the heels of *Arizona II*, this Court plainly understood that the claims were not of the "title divesting" character encompassed by

the QTA, or else the Court's direction that they be pursued in the District Court would have mandated an exercise in futility. This seems unlikely in light of the Court's urging of expeditious resolution of the boundary issues by the District Court, a goal that the Ninth Circuit seems to have gone out of its way to frustrate.

III. Even if the Quiet Title Act were applicable, the United States should be required to prove that there is at least a "substantial possibility" that the disputed lands are "trust or restricted Indian lands".

Even assuming that the Ninth Circuit's conclusion that the QTA applies to the District Court action were correct, whether the disputed lands qualify as "trust or restricted Indian lands" must still be determined. Relying on this Court's language in *Mottaz* that the Indian lands exemption applies when the United States "claims" such status for disputed lands, 106 S.Ct. at 2226, the United States argues that its mere pleading that the Secretary has already determined such status is enough. The Ninth Circuit agreed, thus in effect validating the very Secretarial decision under challenge. The United States was unsuccessful in a similar ploy to avoid the QTA sovereign immunity waiver before the Eighth Circuit, which held that the United States' bare *ipse dixit* before the district court that certain lands were "trust or restricted Indian lands" was not sufficient to invoke that exception to the QTA. Rather, it required that the United States "prove that there is a 'substantial' possibility that the lands in question are 'trust or restricted Indian lands' " and remanded for a determination of that issue *on the merits*:

> Because the district court did not address this issue, we reverse and remand for resolution of this issue on the merits. On the record before us, and without the benefit of findings or briefing on these issues, we can only determine that there may or may not be a substantial possibility that the Spaeths' lands are trust or restricted lands.

Spaeth v. United States Secretary of Interior, 757 F.2d 937, 943 (8th Cir. 1985) (emphasis added); *accord*, *United States v. Phillips*, 362 F.Supp. 462 (D. Neb. 1973). Senior Circuit Judge Henley's concurring opinion in *Spaeth* argued that the "substantial possibility" standard for determining whether the United States' claim was meritorious was too vague and that the district court should simply be directed to decide the jurisdictional issue on the merits (757 F.2d at 947):

> To me, this is simply a situation where the threshold jurisdictional issue is intertwined with the merits and must be decided. Either we have jurisdiction or we do not! If in deciding we also decide the merits, so be it.
>
> It is established that a court has jurisdiction to determine whether it has jurisdiction. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* §3536 (1984). As a corollary to this rule, "if the attack on jurisdiction requires the court to consider the merits of the case, the court has jurisdiction to proceed to a decision on the merits. [Citations omitted]."

The Ninth Circuit attempted to distinguish *Spaeth* as follows (Pet. App. 10a-11a (emphasis added)):

> This circuit's recent *Wildman* case puts at rest any possible argument that MWD might assert in this regard. "Nothing in the statute [QTA] or its history suggests that the United States was to be put to the burden of establishing its title when it has a *colorable claim* and has chosen to assert its immunity on behalf of land of which the Government declares that it is the trustee for Indians." *Id.* at 1309. The *Wildman* court goes on to state that "[s]overeign immunity, therefore, prevents the district court from exercising jurisdiction. The immunity of the government applies whether the government is right or wrong."

This simplistic interpretation runs counter to the basic objectives of the QTA and the modern Congressional trend, reflected in both that Act and the 1976 APA amendment, to make the Federal Government responsible for its actions. The basic issue is how a district court is to determine whether the United States has presented a "colorable claim". Here the Secretary's Fort Mojave and Colorado River boundary decisions simply implemented the legal theories which had been rejected by Special Master Rifkind in *Arizona I*, but left undecided by this Court. The *ex parte* manner in which those decisions were reached were condemned both by this Court in *Arizona II* and by the District Court below. Although neither court reached the merits of the Secretary's boundary interpretations, the State Parties' briefs before this Court in *Arizona II* show that they clearly violate well established canons of construction governing boundary descriptions. Consequently, against that background,

neither decision should carry any presumption of validity and cannot be considered a "colorable claim".

Similarly, the background of the Fort Yuma decision negates a presumption of its validity. The 25,000 acre boundary dispute on that reservation was initially resolved by Interior Department Solicitor Margold in 1936. His interpretation was the basis for the United States' claim in *Arizona I* and was not disputed by the State Parties. The Margold decision was reaffirmed by Solicitor Weinberg in 1968. However, the Tribes persuaded the Secretary to review the issue in 1975. After a full briefing and oral argument by all affected parties, including the State Parties, the Secretary reaffirmed the Margold opinion and had Solicitor Austin render a formal opinion on the issue. 84 I.D. 1 (1977). Nevertheless, the new Administration decided to review the matter again. After having assured the State Parties that they would be consulted and afforded an opportunity for a hearing if the Solicitor decided to reopen the issue, the Solicitor summarily reversed the *Austin* opinion on a completely *ex parte* basis and the Justice Department filed it the following day in support of its claim for additional water for the Quechan Tribe in *Arizona II*. Here again, such circumstances wholly negative any basis for a presumption of validity to the Secretary's decision.

Spaeth's approach is essentially the same as that followed by this Court before the 1976 amendment to the APA to determine whether an action against a federal official was barred by sovereign immunity. *See, e.g., Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962) (allegations that a federal officer exceeded his statutory authority or violated Constitutional safe-

guards so as to make suit one not against the sovereign requires determination of those issues on the merits); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action; Some Conclusions from the Public Lands Cases*, 68 Mich. L. Rev. 867 (1970) (analyzing this Court's historic reluctance to recognize the sovereign immunity defense in public lands cases); *cf. Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 18, *reh'g denied* 296 U.S. 664 (1935) (Secretary's survey delineating federal lands from state-owned tidelands is not conclusive, since "question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always one for judicial determination"); *Ritter v. Morton*, 513 F.2d 942, 946 (9th Cir.), *cert. denied* 423 U.S. 947 (1975) (recognizing that "in title dispute cases the issue of sovereign immunity and the ultimate merits of a plaintiff's claim are intimately interconnected"). The *Spaeth* rule is also similar to this Court's approach to determining whether a state has advanced a "colorable claim" in support of an Eleventh Amendment sovereign immunity defense. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). *Cf. Lyng v. Northwest Indian Cemetery Protective Ass'n*, 56 U.S.L.W. 4292, 4301 (U.S. April 19, 1988) (where Indian tribes challenge federal land use action as impairing free exercise of their religion, "it is not enough to allege simply that the land in question is held sacred", but tribes must "show that the decision poses a substantial and realistic threat of frustrating their religious practices" (dissenting opinion)). This Court should require, at the minimum, a similar approach in order to prevent the United States from creating a massive loophole in the QTA by unilateral, *ex parte* boundary or other determi-

nations purporting to redesignate public lands as Indian trust lands.

In the absence of such a threshold procedure the potential for mischief, particularly in the West, is enormous. The United States owns 755 million acres of land, concentrated predominantly in the eleven Western States and Alaska where its lands comprise from 29 to 95 percent of all land in those states. *PLLRC Report*, note 9 *supra*, Ch. 1. Interspersed throughout those extensive federal landholdings (as well as state and privately owned lands based on public land patents) are some 44 million acres of Indian trust lands, most of which are located in formal reservations.[12] The original public land surveys were notoriously "rough", and the Secretary has long been authorized to conduct resurveys to properly delimit the public lands. Gates, *History of Public Land Law Development*, 420-21 (GPO 1968); Act of March 3, 1909, 43 U.S.C. §772; Piccone, *Resurveys of Public Lands*, 30 Rocky Mt. Min. Law Inst. 20-21 (1984). If such resurveys result in lands formerly designated as public lands being reclassified as Indian lands, property owners whose rights accrued on the basis of the original survey will be unable to challenge that redetermination, thus emasculating the careful protection afforded "bona fide claimants" under the proviso to the Secretary's resurvey authority under 43 U.S.C. §772. The long established right of such property claimants to assert their interests in a direct action against the Secretary challenging the survey (*Cragin v. Powell*, 128 U.S. 691 (1888)) will be gone. This

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[12] U.S. Dep't of the Interior, Bureau of Indian Affairs, *Annual Report of Indian Lands* (September 30, 1984) at 2-3.

outrageous result necessarily flows from the Ninth Circuit's earlier decision that the exclusive method for such claimants to enforce the rights guaranteed by that proviso is under the QTA (page 33 *supra*), coupled with its present decision that no affirmative relief at all is available under the QTA if the United States simply alleges that the reclassified lands are "trust or restricted Indian lands."

Nothing in the sparse legislative history of the Indian lands exemption supports the Ninth Circuit's conclusion. S. 216, as introduced, contained no such exclusion. The Interior Department's report on S. 216 recommended enactment of a Justice Department substitute bill and stated that it preferred the Justice Department's proposal because, *inter alia*, it would exempt trust or restricted Indian lands from its coverage (*Senate QTA hearings*, note 10 *supra*, at 2):

> Secondly, the Justice proposal specifically excludes lands held in trust for Indians and Indian restricted lands. The Federal government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States government. The Federal government has over the years made commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his Administration against abridging the historic relationship between the Federal government and the Indians without the consent of the Indians.

That position was repeated almost verbatim by the Interior Department's witness during Senate hearings on S. 216, but generated little discussion.[13] The Justice Department witness did not specifically address the issue. The Indian lands exemption was adopted and enacted with no consideration at all as to how such status would be established. However, no one even intimated that the mere claim of such status for particular lands would prevent a court from examining the merits of that claim. Consequently, it defies common sense to believe that Congress intended that the result reached by the Ninth Circuit would flow from enactment of a statute whose overriding purpose was to *remove* the bar of sovereign immunity from title disputes with the United States. Properly construed, along the lines of the Eighth Circuit's approach, the QTA does not produce that bizarre result.

IV. The Ninth Circuit's decision frustrates Congressional objectives to permit orderly Indian water rights adjudications in the Western States.

Section 1(a) of the QTA (28 U.S.C. §2409a(a)) provides that the Act applies only to title disputes over "real property in which the United States claims an interest, *other than* a security interest or *water rights*" and that it does not "apply to or affect actions

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[13] *Senate QTA hearings* at 19. One public witness stated that "I do not think anybody objects that Indian lands should be exempt" (*id.* at 36) while another commented that "[i]t is not clear to us why these lands were omitted from the effect of the [Justice Department] bill because the boundaries of restricted Indian lands are just as much of a problem as are other public lands or formerly public lands." *Id.* at 58.

which may be or could have been brought under . . . section 208 of the Act of July 10, 1952 (43 U.S.C. 666)" (emphasis added), the 1952 waiver of sovereign immunity with respect to general stream adjudications of water rights involving the United States (the McCarran Amendment) which this Court has held encompasses suits involving Indian water rights. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The quoted language was proposed in a draft bill authored by the Justice Department, which explained that it "does not apply to civil actions . . . involving or relating to water rights." H.R. Rep. No. 1559, 92d Cong. 2d Sess. 10 (1972). The State Parties interpret section 1(a) as expressly preserving then existing law waiving sovereign immunity in the highly controversial field of western water rights adjudications. However, the United States' opposition to the State Parties' certiorari petition asserts, for the first time in this litigation, that the "QTA expressly *precludes* suits concerning the validity of 'water rights' ". U.S. Opp. Br. at 14, n. 6 (emphasis added). We believe that contention to be so obviously in error as to require no argument.

The QTA refers only to the McCarran Amendment as being unaffected by its provisions since it was the only legislative waiver of sovereign immunity for water rights litigation then in effect. Undoubtedly, if the 1976 APA sovereign immunity waiver had been law at the time the QTA would have also specified that legislation. In any event, the District Court suit below is clearly an action "involving or relating to water rights" inasmuch as the determination of an Indian reservation boundary is the essential first step

in the adjudication of the "practicably irrigable acreage" within the boundaries of an Indian reservation which is entitled to a *Winters* right. In essence the State Parties seek a *partial* adjudication of the essential elements of the water rights of the three reservations—the boundary portions. Moreover, it is plainly ancillary to the already completed comprehensive adjudication of all other Lower Colorado River water rights in California involved in *Arizona I*, which the Court of Appeals properly noted may satisfy the McCarran Act "streamwide adjudication" standard. Pet. App. at 11a.

The Ninth Circuit decision, if allowed to stand, will produce a highly deleterious impact on the already controversial area of Indian water rights adjudications in the West. At the time of enactment of the QTA a water right claimant wanting to contest a disputed boundary component of a *Winters* right claim for an Indian reservation had two options. He could participate in a general stream adjudication in which the disputed boundary would be tried and adjudicated in conjunction with the United States' *Winters* claim. If a general stream adjudication were not underway, the water rights claimant could attempt to litigate the validity of the contested *Winters* claim, including any underlying boundary disputes, in accordance with the criteria set forth in *Malone v. Bowdoin*, 369 U.S. 643 (1962). *See, e.g., Dugan v. Rank*, 372 U.S. 609 (1963). In that regard the State Parties note that although the District Court did not address the merits of the Secretary's interpretation of the Fort Mojave boundary description in the present case, it did find his order invalid as in excess of his statutory authority under 43 U.S.C. §772 and because of consti-

tutional due process infirmities, thus meeting both *Malone* criteria.

The amendment of the APA in 1976 waiving the doctrine of sovereign immunity in review of agency actions was intended to eliminate the need for the officer's suit fiction. In recognition of that purpose, the Ninth Circuit has already held that the APA waiver permits suits against federal officials with respect to actions affecting water rights because the McCarran Amendment did not make general stream adjudications the exclusive vehicle for resolving water rights claims, as this Court held in its *Colorado River Water Conservation District* and *San Carlos Apache Tribe* decisions, *supra*. *South Delta Water Agency v. United States*, 767 F.2d 531 (9th Cir. 1985); *accord*, *Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts v. United States*, 832 F.2d 1127 (9th Cir. 1987). Despite these holdings, the Ninth Circuit decision below holds, inconsistently, that a suit challenging Indian boundary determinations *solely* to determine water rights, not to divest the United States of any of its interests in land, is barred. Consequently, although aggrieved parties may now obtain APA review of federal agency actions adversely affecting their water rights, they may not do so if the agency action relates to an Indian reservation boundary determination or, indeed, to any action that would arguably impose an Indian trust status on the public lands affected by the agency action. Thus, if the Secretary redetermines the boundary of a wildlife refuge, national forest or any other kind of federal reservation, other than an Indian reservation, an aggrieved water user may challenge that action if he can show a threatened adverse impact on his rights resulting

from the increased amount of acreage entitled to an impliedly reserved water right. *See, e.g., United States v. New Mexico*, 438 U.S. 696 (1978). However, if the disputed boundary order segregates an Indian reservation from the public domain, the aggrieved water user will have no relief unless and until a streamwide adjudication is initiated and completed.

In summary, under the Ninth Circuit's decision the ironic result of (1) Congress' commendable attempt in the QTA to preserve existing law waiving sovereign immunity in water rights disputes and (2) Congress' later broad waiver of the sovereign immunity defense in the 1976 APA amendments has been to *narrow* water claimants' access to the courts where they seek review of a *Winters* claim involving a disputed Indian reservation boundary until a streamwide adjudication is completed. The absurdity of this retrogressive result demonstrates the basic fallacy of the Ninth Circuit's decision, and this Court should nip in the bud the confusion and inequity which the decision will inevitably cause in Indian water rights adjudications in the West.

V. The boundary disputes present justiciable controversies.

The Ninth Circuit offered its views, but not its formal decision, that "[t]here is a substantial question . . . .whether a suit initiated by Metropolitan at this time presents a case or controversy" (Pet. App. at 6a, note 3).

Even though the court found it unnecessary to decide the question, its discussion makes it clear that

it has not only reached a conclusion, but an erroneous one. Consequently, if the present sovereign immunity decision is overturned the Ninth Circuit will undoubtedly simply dismiss for lack of a case or controversy. Therefore a decision by this Court on that issue is necessary to prevent even further delay of the resolution of the boundary controversies.

The Ninth Circuit's analysis has at least two obvious flaws. First, Special Master Tuttle's recommended decision that the Secretary's orders were "final determinations" had no independent judicial status until acted upon by this Court. Second there is certainly no dispute that the Secretary's boundary orders were "final agency actions" subject to review, even though they did not constitute "final determinations" for purposes of further allocations of water under the decree in *Arizona I*. Although those boundary decisions *per se* have not yet caused an actual reduction in Metropolitan's supply under its water delivery contracts, they formed the basis for the United States' claim for additional water in *Arizona II* and have caused substantial uncertainty as to Metropolitan's legally available water supply in the near future and greatly complicated its planning efforts. Thus they clearly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "certainty" of injury to a more liberal "probability" of injury. Davis, 4 *Admin. Law Treatise* §24.12 (1983); *Bryant v. Yellen*, 447 U.S. 352 (1980). Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. *Abbott Laboratories v. Gardner*, 387 U.S.

136 (1967); Davis, 4 *Admin. Law Treatise* §§ 25.6-25.10 (1983). This is particularly true inasmuch as the Fort Mojave Tribe is currently diverting and using substantial quantities of water on the disputed area on that reservation and the Colorado River Tribes have recently circulated for public comment a land use development plan for the disputed area on that reservation. In any event, this Court's decision in *Arizona II* that the District Court hear the boundary disputes should be dispositive of this issue.

CONCLUSION

The Ninth Circuit's decision should be reversed and the interlocutory appeals vacated as moot concurrently with the entry of an order under the decree in *Arizona v. California* appointing District Judge Brewster special master and directing him to conclude his review of the boundary issues as expeditiously as possible and to submit a recommended decision to the Court.

In the alternative, the action should be remanded to the Ninth Circuit with directions to expedite a decision on the merits of the interlocutory appeals pending before that court. If this alternative is followed, the Court's decision should make it clear that the three boundary disputes present justiciable cases or controversies.

Respectfully submitted,

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APPENDIX

APPENDIX

QUESTION: Well, Mr. Claiborne, what is your—the United States' position in these other forums? Are you taking the position that the Secretary's proceedings are open to review, or are you moving to dismiss for want of jurisdiction, or on sovereign immunity grounds?

MR. CLAIBORNE: Justice White, as was correctly stated, I think, by Mr. Boronkay, the United States has in the proceeding filed in the Southern District of California submitted a motion to dismiss alleging—

QUESTION: So you are saying—your position is that these determinations are not subject to review anywhere, here or in another forum.

MR. CLAIBORNE: I hope I do not have to—I disown the motion to dismiss which has been filed by the United States in the district court. Whether that—all of those defenses or some of them will prevail in that court is something—

QUESTION: Well, suppose they had prevailed. Would you still take the same position here?

MR. CLAIBORNE: Yes, we would. And—we would, assuming that that decision had survived appeal or had not been appealed, and had sustained our motion to dismiss, we would rest on the correctness of that ruling, and there is much law to the effect that—

Transcript of Oral Argument, *Arizona II* (December 8, 1982) at 61-62.